

1 David B. Rosenbaum (009819)  
2 Travis C. Hunt (035491)  
3 BriAnne N. Illich Meeds (036094)  
4 OSBORN MALEDON, P.A.  
5 2929 North Central Avenue, 21st Floor  
6 Phoenix, Arizona 85012-2793  
7 Telephone: (602) 640-9000  
drosenbaum@omlaw.com  
thunt@omlaw.com  
billichmeeds@omlaw.com  
*Counsel for C.M. Plaintiffs*

*(Additional Counsel for Plaintiffs Listed on the Signature Page)*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

13 C.M., on her own behalf and on behalf of her minor child, B.M.; *et al.*

No. 2:19-cv-05217-SRB

**PLAINTIFFS' MOTION TO  
REOPEN DISCOVERY FOR THE  
LIMITED PURPOSE OF  
COMPELLING THE  
PRODUCTION OF DEPOSITION  
TRANSCRIPTS AND EXHIBITS**

14 Plaintiffs

United States of America,  
Defendant.

19 A.P.F., on his own behalf and on behalf of his minor child, O.B.: *et al.*,

No. 2:20-cv-00065-SRB

20 Plaintiffs.

United States of America,  
Defendant.

## **INTRODUCTION**

Plaintiffs seek unredacted copies of the transcripts of and exhibits from five depositions taken in *Wilbur P.G., et al. v. United States*, Case No. 4:21-cv-04457-KAW (N.D. Cal.) (the “PG Action”), a lawsuit, like the instant actions, brought by families separated under the government’s “DHS Referral Policy.” Three of the five depositions in question are of potential trial witnesses in the *CM* and *APF* cases. The remaining two are of Rule 30(b)(6) representatives of the Department of Homeland Security and Customs and Border Protection.

Shortly after these witnesses were deposed in late 2023 in the *PG* Action, Plaintiffs became aware of the depositions, and promptly requested that the government produce the unredacted transcripts. Plaintiffs have reiterated that request multiple times, but the government refuses to produce the transcripts and exhibits on the ground that fact discovery has closed, pursuant to the Amended Case Management Order, ECF No. 144. Declaration of Lucy S. McMillan (“McMillan Decl.”), dated February 12, 2024, ¶¶ 6-10. Plaintiffs also asked plaintiffs’ counsel in the *PG* Action (“*PG* Counsel”) to produce the unredacted transcripts and exhibits. *Id.* ¶ 11. *PG* Counsel advised that it is willing to do so, but government counsel in that case objected, citing the protective order in the *PG* Action (No. 21-cv-04457, ECF No. 58), which is substantively identical to the Protective Order in the *CM* case (ECF No. 58), and in the *APF* case (ECF No. 45) (the “Protective Orders”). In a motion to preserve the government’s confidentiality designations of the transcripts and exhibits at issue, government counsel in the *PG* Action argued that this Court, “presiding over the *CM/APF* actions in the District of Arizona, should be permitted to adjudicate the dispute between the parties [concerning the transcripts and exhibits]...in the first instance” (No. 21-cv-04457, ECF. No. 160 at 3). Accordingly, Plaintiffs have been unable to obtain highly relevant transcripts and exhibits, even though *PG* Counsel is willing to produce them at no expense to the government, and

1 even though the transcripts and exhibits would be available to Plaintiffs (and  
 2 admissible at trial) but for the protective order in place in the *PG* Action.

3 Plaintiffs respectfully request that the Court modify the Amended Case  
 4 Management Order to allow for this additional production, and order the  
 5 government to produce the unredacted deposition transcripts and exhibits to  
 6 Plaintiffs.

7 **BACKGROUND**

8 The Court so-ordered the parties' stipulated Protective Order in the *CM* case  
 9 on July 22, 2020 (ECF No. 58), and in the *APF* case on September 4, 2020 (ECF  
 10 No. 45). Under the Protective Orders, the government is permitted to designate  
 11 documents, or portions of documents, that meet the Protective Orders' standards as  
 12 confidential information. The government has relied on the Protective Orders, as  
 13 well as the protective orders in place in other family separation cases, to share  
 14 deposition transcripts and documents from the *CM* and *APF* cases with plaintiffs'  
 15 counsel in other federal court litigations pertaining to family separations. Email  
 16 from I. Majumdar to M. Schlesinger, J. Carey, and T. Park, et al., dated Feb. 6, 2023,  
 17 attached as Ex. 1 to the McMillan Decl. ("We plan to request that the sealed orders  
 18 [from *CM* and *APF*] can be shared [with counsel for plaintiffs in similar cases] under  
 19 the condition that they be deemed confidential information, subject to the protective  
 20 orders entered by the courts in those cases. As you are likely aware, 'common  
 21 discovery' documents and deposition transcripts have been produced in other FTCA  
 22 family separation cases."). The government shared those documents and deposition  
 23 transcripts so that the parties in other family separation cases could "benefit from  
 24 the considerable work already done by the parties" in *CM* and *APF*. *Id.*

25 Fact discovery closed in the instant actions in July 2022. More than a year  
 26 later, in late 2023, three witnesses who were deposed in the *CM* and *APF* cases, and  
 27  
 28

1 whom the parties have identified as potential trial witnesses in *CM* and *APF*, were  
2 deposed in the *PG* Action:

- Sean Lokey (Assistant U.S. Attorney, United States Attorney's Office for the District of Arizona),
- Shawn Jordan (Executive Officer in the Yuma Border Patrol Sector, Customs and Border Protection), and
- Matthew Albence (former Executive Associate Director, Immigration and Customs Enforcement).

9 In addition, *PG* Plaintiffs deposed one witness from the Department of Homeland  
10 Security (James McCament) and another from Customs and Border Protection  
11 (Benjamine “Carry” Huffman), pursuant to Federal Rule of Civil Procedure  
12 30(b)(6). On information and belief, these witnesses made statements on behalf of  
13 the government about the DHS Referral Policy and its implementation.

14 Plaintiffs asked the government to produce the unredacted deposition  
15 transcripts and exhibits of these potential trial witnesses and 30(b)(6) witnesses  
16 during a meet and confer on November 27, 2023, and again in writing on December  
17 5, 11, and 13, 2023. McMillan Decl. ¶¶ 7-8, 10. On December 14, 2023, Plaintiffs  
18 raised the dispute concerning the unredacted transcripts with the Court during a  
19 status conference. *Id.* ¶12. The Court stated that Plaintiffs could file a motion to  
20 address Plaintiffs' request for the unredacted transcripts. The Court also stated: "the  
21 confidentiality order that already exists in this case would be sufficient to protect  
22 any issues of confidentiality that arose in a different case. So I don't want to have  
23 any briefing on that. That would be my ruling. If there's other reasons why the  
24 government believes that those deposition transcripts can't be provided, we can  
25 address – you can address that in writing." Transcript of Status Conference at 19,  
26 attached as Ex. 2 to the McMillan Decl. Since that time, Plaintiffs have sought the  
27 unredacted transcripts and exhibits from *PG* Counsel, and again requested them

1 from the government in the *CM* and *APF* actions. McMillan Decl. ¶ 13. The  
 2 government's position is that it is not obligated to produce the deposition transcripts  
 3 and exhibits, and that Plaintiffs are not permitted to obtain the unredacted transcripts  
 4 from *PG Counsel*.

5 **STANDARD OF REVIEW**

6 The purpose of discovery is to "provide the parties with full knowledge of  
 7 the facts, thereby reducing the risk of surprise at trial." *MJG Enterprises, Inc. v.*  
 8 *Cloyd*, No. 2:10-CV-86-TMB, 2012 WL 12964345, at \*1 (D. Ariz. Oct. 30, 2012)  
 9 (citing *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947)). "[W]ide access to  
 10 relevant facts serves the integrity and fairness of the judicial process by promoting  
 11 the search for the truth." *Id.* (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir.  
 12 1993)). A party that has in good faith conferred or attempted to confer regarding a  
 13 particular disclosure may move to compel disclosure. Fed. R. Civ. P. 37. "While it  
 14 is true that, generally, motions to compel must be filed within the scheduled time  
 15 for discovery, [Rule] 37 provides no deadline for the filing of a motion to compel."  
 16 *Sandoz Inc. v. United Therapeutics Corp.*, No. 19-CV-10170, 2021 WL 2453142,  
 17 at \*1–2 (D.N.J. June 16, 2021) (allowing limited discovery after the close of fact  
 18 discovery "in fairness to the parties" and in light of particular circumstances of  
 19 case); *Starr Int'l Co. v. Am. Int'l Grp., Inc.*, No. 05 CIV. 6283 BSJ MHD, 2007 WL  
 20 646211, at \*1 (S.D.N.Y. Feb. 26, 2007) (allowing limited discovery and noting that  
 21 the party's request was "not unreasonable in view of the fact that the new entities  
 22 were not disclosed until late December," "long after the official end of fact  
 23 discovery").

24 Under Rule 16 of the Federal Rules of Civil Procedure, a party may move to  
 25 modify a scheduling order and reopen discovery "for good cause and with the  
 26 judge's consent." Fed. R. Civ. P. 16(b)(4). In determining whether to reopen  
 27 discovery, courts consider six factors: 1) whether the moving party was diligent in  
 28

1 obtaining discovery within the guidelines established by the court; 2) the  
 2 foreseeability of the need for additional discovery in light of the time allowed for  
 3 discovery by the district court; 3) the likelihood that the discovery will lead to  
 4 relevant evidence; 4) whether the non-moving party would be prejudiced; 5)  
 5 whether trial is imminent; and 6) whether the request is opposed. *SiteLock LLC v.*  
 6 *GoDaddy.com LLC*, No. CV-19-02746-PHX-DWL, 2023 WL 4661842, at \*3, 5 (D.  
 7 Ariz. July 20, 2023) (granting a motion to reopen fact discovery for the limited  
 8 purpose of issuing third party subpoenas for a narrow set of documents); *see also*  
 9 *Hooks v. Target Corp.*, No. 5:22-CV-00052, 2023 WL 4680352 (C.D. Cal. June 1,  
 10 2023) (granting plaintiff's motion to reopen discovery to allow plaintiff to complete  
 11 certain depositions and to move to compel an interrogatory response). The primary  
 12 consideration is “the diligence of the party seeking the amendment.” *Johnson v.*  
 13 *Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

14 **ARGUMENT**

15 There is good cause to reopen discovery for the limited purpose of ordering  
 16 the government to produce the unredacted transcripts and exhibits of five  
 17 government witnesses deposed in the *PG* Action. While the government opposes  
 18 Plaintiffs' request, the remaining factors weigh in Plaintiffs' favor.

19 *Diligence and foreseeability.* Plaintiffs have diligently sought production of  
 20 the unredacted deposition transcripts and related exhibits. Plaintiffs first requested  
 21 these documents during a meet and confer with the government on November 27,  
 22 2023, and then requested them in writing on December 5, 11, and 13, 2023.  
 23 McMillan Decl. ¶¶ 7-8, 10. On December 14, 2023, Plaintiffs raised the dispute with  
 24 the Court at a conference. *Id.* ¶ 12. Plaintiffs then followed up with the government  
 25 on December 15 and 21, 2023, and January 11 and 22, 2024. *Id.* ¶ 13. Finally, on  
 26 February 2, 2024, Plaintiffs informed the government that it would file this motion.  
 27 *Id.* ¶ 14. In addition, Plaintiffs requested the transcripts and exhibits from *PG*  
 28

1 Plaintiffs. Plaintiffs could not have requested the materials prior to the close of fact  
 2 discovery given that the transcripts did not exist until more than a year later. Nor  
 3 could Plaintiffs reasonably have foreseen that the government would refuse to  
 4 produce plainly relevant discovery in its possession. *See, e.g., Galvan v. Duffie*, No.  
 5 EDCV 13-1492-MWF, 2019 WL 6448958, at \*4 (C.D. Cal. June 25, 2019)  
 6 (granting motion to reopen discovery for the limited purpose of completing certain  
 7 depositions where there was “no indication that Plaintiff has been dilatory in  
 8 pursuing the [depositions at issue], and reopening discovery appears likely to lead  
 9 to relevant evidence”); *Hooks*, 2023 WL 4680352, at \*2 (granting motion to reopen  
 10 discovery to allow plaintiff to complete certain depositions where plaintiff  
 11 “diligently attempted to contact [defendant] and coordinate the scheduling of the  
 12 Noticed Depositions”).

13 Relevance. There can be no reasonable dispute that the transcripts and  
 14 exhibits are highly relevant. The claims and defenses in the *PG* Action are  
 15 substantially similar to those at issue in the instant actions and the deposition  
 16 transcripts contain statements made under oath by potential trial witnesses, or by  
 17 30(b)(6) witnesses, about the development and implementation of the same policies  
 18 that are central to this litigation. *See, e.g., Tasty One, LLC v. Earth Smarte Water,*  
 19 *LLC*, No. 2:20-CV-1625, 2023 WL 362666, at \*2 (D. Nev. Jan. 20, 2023) (granting  
 20 defendant’s motion to reopen discovery where depositions sought “may produce  
 21 evidence that is relevant to either party’s claims or defenses”).

22 Indeed, the transcripts may be used at trial in this action, whether for  
 23 purposes of impeachment, as statements of a party opponent or in the event that the  
 24 witness is unavailable at trial. Fed. R. Civ. Proc. 32(a); *see also* Fed R. Civ. Proc.  
 25 30(b)(6); *Illani v. Abraham*, No. 2:17-CIV-00692-APG-GAL, 2018 WL 10467640,  
 26 at \*2 (D. Nev. Aug. 21, 2018) (“[T]estimony of a Rule 30(b)(6) designee ‘represents  
 27 the knowledge of the [government agency.]’”) (citation omitted). Moreover, the  
 28

1 government has the benefit of knowing what these potential trial witnesses said  
 2 under oath during their depositions in the *PG* Action—and whether that testimony  
 3 was consistent with or contradicted the witnesses’ testimony in the instant actions—  
 4 and Plaintiffs should have the same access to the transcripts.

5 Lack of prejudice. The government has identified no prejudice it would suffer  
 6 if compelled to produce the transcripts to Plaintiffs, and there is none. The  
 7 government has not disputed that it has ready access to the transcripts and exhibits—  
 8 it need only produce them. Even if the act of producing readily available materials  
 9 imposed some limited burden on the government (and it does not), counsel for *PG*  
 10 Plaintiffs are willing to provide the transcripts and exhibits to Plaintiffs at no cost  
 11 or burden to the government, so long as government counsel consents. Although the  
 12 deposition transcripts and exhibits contain information that government counsel in  
 13 the *PG* Action has designated as “Confidential,” production of the transcripts here  
 14 would be governed by the Protective Orders, which provide the same protections as  
 15 the protective order in the *PG* Action and pursuant to which the government has  
 16 produced thousands of other purportedly confidential documents in these cases.

17 Notably, throughout the course of these litigations, the government has  
 18 repeatedly sought, and received, permission to share documents *and* deposition  
 19 transcripts for depositions taken in the *CM* and *APF* actions (which were also  
 20 designated confidential under the Protective Orders) with plaintiffs in other similar  
 21 litigations, including *PG* Plaintiffs. It is illogical and fundamentally unfair for the  
 22 government to allow plaintiffs in other family separation cases to have the benefit  
 23 of the deposition transcripts from the *CM* and *APF* cases, while barring *CM* and  
 24 *APF* Plaintiffs’ access to highly relevant deposition transcripts from the *PG* Action.

25 Inminence of trial. The trial, scheduled for late April 2024, is not so  
 26 imminent as to weigh against ordering the government to provide the requested  
 27 transcripts and exhibits, particularly given the limited scope of discovery sought. If  
 28

1 so ordered by this Court, Plaintiffs could receive access to the unredacted transcripts  
2 and exhibits, which are readily available to the government, within days, resulting  
3 in no foreseeable impact on scheduling in this matter. *See, e.g., Tasty One, LLC,*  
4 2023 WL 362666, at \*2 (reopening discovery where doing so would not “delay any  
5 judicial proceedings”).

6 **CONCLUSION**

7 For the foregoing reasons, Plaintiffs respectfully request that the Court  
8 reopen discovery and compel Defendant to produce to Plaintiffs the unredacted  
9 deposition transcripts and related exhibits from the *PG* Action, subject to the terms  
10 of the Protective Order.

11

12 RESPECTFULLY SUBMITTED this 13th day of February, 2024.

13

14 /s/ BriAnne Illich Meeds

15 David B. Rosenbaum  
Travis C. Hunt  
16 BriAnne N. Illich Meeds  
OSBORN MALEDON, P.A.  
2929 North Central Avenue,  
21st Floor  
17 Phoenix, Arizona 85012-2793

18

*(Additional Counsel for Plaintiffs Listed on the Following Page)*

19

Diana Reiter\*  
Erik Walsh\*  
Lucy McMillan\*  
Harry Fidler\*  
Kaitlyn Schaeffer\*  
Brian Auricchio\*  
Julia Kindlon\*  
Arnold & Porter Kaye Scholer LLP  
250 West 55th Street | New York, New  
York 10019-9710  
212-836-8000  
diana.reiter@arnoldporter.com  
erik.walsh@arnoldporter.com  
lucy.mcmillan@arnoldporter.com

20 Jonathan H. Feinberg\*  
Kairys, Rudovsky, Messing, Feinberg  
& Lin LLP  
The Cast Iron Building  
718 Arch Street, Suite 501 South  
21 Philadelphia, PA 19106  
215-925-4400  
jfeinberg@krlawphila.com

22

23 Mark Fleming\*  
Mark Feldman\*  
24 National Immigrant Justice Center  
224 S. Michigan Ave., Suite 600  
25 Chicago, IL 60604

26

27

28

1 harry.fidler@arnoldporter.com  
2 kaitlyn.schaeffer@arnoldporter.com  
3 brian.auricchio@arnoldporter.com  
4 julia.kindlon@arnoldporter.com

5 R. Stanton Jones\*  
6 David Hibey\*  
7 Emily Reeder-Ricchetti\*  
8 Arnold & Porter Kaye Scholer LLP  
9 601 Massachusetts Avenue, NW  
10 Washington, DC 20001  
11 202-942-5000  
12 stanton.jones@arnoldporter.com  
13 david.hibey@arnoldporter.com  
14 emily.reeder-  
15 ricchetti@arnoldporter.com

16 Sean Morris\*  
17 Arnold & Porter Kaye Scholer LLP  
18 777 S. Figueroa St., 44th Fl.  
19 Los Angeles, CA 90017  
20 sean.morris@arnoldporter.com

21 David B. Rosenbaum  
22 Travis C. Hunt  
23 BriAnne N. Illich Meeds  
24 OSBORN MALEDON, P.A.  
25 2929 North Central Ave Ave., 21st Fl.  
26 Phoenix, Arizona 85012-2793

27 312-660-1370  
28 mfleming@heartlandalliance.org  
29 mfeldman@heartlandalliance.org

30 Trina Realmuto\*  
31 Mary Kenney\*  
32 National Immigration Litigation Alliance  
33 10 Griggs Terrace  
34 Brookline, MA 02446  
35 857-305-3600  
36 trina@immigrationlitigation.org  
37 mary@immigrationlitigation.org

38 Katherine Melloy Goettel\*  
39 Emma Winger\*  
40 Gianna Borroto  
41 American Immigration Council  
42 1331 G Street NW, Suite 200  
43 Washington, DC 20005  
44 202-507-7512  
45 202-742-5619  
46 kgoettel@immccouncil.org  
47 ewinger@immccouncil.org  
48 gborroto@immccouncil.org

\* Admitted pro hac vice

*Attorneys for C.M. Plaintiffs*

*Attorneys for APF Plaintiffs*